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In the Supreme Court of the United States

OCTOBER TERM, 1976

MOBIL OIL CORPORATION, *Petitioner*,

vs.

HARRY LIGHTCAP and LELA LIGHTCAP, W. I. CUTTER, FERN ELLEN MAUPIN, RICHARD M. STEWART, HAROLD PARKER and FANNIE M. FLOWER, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS IN OPPOSITION

DALE M. STUCKY
GERRIT H. WORMHOUDT
of FLEESON, GOOING, COULSON & KITCH
P. O. Box 997, 125 N. Market
Wichita, Kansas 67201
Attorneys for Respondents

Of Counsel:
KRAMER, NORDLING, NORDLING & FAY
P. O. Box 250
Hugoton, Kansas 67951

R. L. MIDDENHALL, INC., 936 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

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OPINION BELOW

The opinion of the Supreme Court of the State of Kansas (Appendix A of Petition) is reported at 221 Kan. 448, 562 P.2d 1. The opinion of the District Court of Stevens County, Kansas, not reported, appears in Appendix C of Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Assuming that such questions have not earlier been adjudicated between these parties, does the commerce clause or federal policy excuse a regulated producer under the Natural Gas Act from payment of debts contractually incurred in the production of natural gas, although the contractual provisions creating such debts and the person owed thereunder are not themselves subject to federal regulation?

STATUTES INVOLVED

Sections 1(a), 1(b), 4(a) and 5(a) of the Natural Gas Act, 52 Stat. 821, 822 and 823, as amended, 15 U.S.C. §§ 717 (a), 717(b), 717c(a) and 717d(a) are set forth in Appendix E of the Petition, pages A117-A119.

Article I, § 8, Clause 3, Article VI, Clause 2 and Fourteenth Amendment, § 1 of the United States Constitution are also set forth in Appendix E of the Petition, page A119.

STATEMENT OF THE CASE

These are six actions brought by respective respondent landowners[1] for the recovery of rents, denominated "roy-

1. These cases have been pending such a long time that four of the seven state court plaintiffs have died during their pendency. The caption of the case is confusing, as it has not kept up with the necessary substitution of parties, and the court below simply referred to the separate cases by reference to the family name of the original plaintiffs. Accordingly, respondents, whose actions were filed in the District Court of Stevens County,

(Footnote continued on following page)

alty,"[2] against petitioner as lessee of their respective tracts of land. The actions were brought in the Kansas state courts approximately 14 years ago and were consolidated for trial and on appeal to the Supreme Court of Kansas. Respondents argued that the provisions in the royalty clauses of the oil and gas leases on their land providing for monthly payment of rent (for months beginning in October of 1958 and extending through June of 1963) required that the petitioner pay rent in amounts related to the market value of the gas mined by petitioner during such month.

Footnote Continued—

Kansas in 1963 and 1964, are Lawrence and William T. Lightcap (substituted for their deceased parents, Harry and Lela Lightcap, plaintiffs in the "Lightcap" case filed as No. 4366), Ralph Cutter, Paul Cutter, Faith Stone and Ruth Smith (substituted for W. I. Cutter, plaintiff in the "Cutter" case filed as No. 4367), Martha Jean Stewart (substituted for Richard M. Stewart in the "Stewart" case filed as No. 4443) and Fern M. Maupin, Harold Parker and Fannie M. Flower (plaintiffs in the "Maupin," "Parker" and "Flower" cases filed as Nos. 4435, 4518 and 4532, respectively), the latter three only having survived as original parties. See Petitioner's Appendix A80 and pages 222 and 234 of the printed "Record on Appeal" in the Kansas Supreme Court, hereinafter referred to as "Record," a copy of which has been transmitted to this Court.

2. A brief exposition of undisputed facts concerning the contractual rental arrangement between the petitioner and respondents, embodied in the leases, may prove helpful for the Court. The respondents own farmland in Western Kansas. Wanting the use of the land on which to conduct its mining business, the lessee acquired oil and gas leases from the landowner. The leasehold arrangement made it possible for it to obtain the use of land without incurring the costs and risks of land investment. All the lessee needed was the right to use the land for such purposes.

The right to engage in oil and gas development and production activities is exclusively in the lessee. The landowner-lessor does not participate in such activities to any extent and *is not entitled to share in any of the profits resulting from those activities*, being only entitled to rental as provided in the negotiated lease, regardless of whether or not the lessee or his joint owners make a profit or lose money.

(Footnote continued on following page)

The court below construed the rental provisions of the leases and classified such leases as either "proceeds" or "market value" leases. That court held that the majority of the leases were "proceeds" leases and, as to those leases, the respondents were not entitled to additional rental payments over and above amounts related to certain payments received and retained by the lessee, conditionally

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Footnote Continued—

The rental obligation in question arises at such time as the lessee begins exercising the particular privilege of carrying on actual gas production operations on the leased tracts. Such rental payments are referred to as "royalty" compensation, as distinguished from "delay rentals" payable before the lessee's commencement of the exercise of the production privilege. The landowner-lessors are within this narrow context referred to as "royalty owners," as distinguished from owners of overriding "royalty" interests (usually resulting from lease assignments or farmout arrangements) who acquire or retain a participating interest in the lessee's venture or become the actual owners of a percentage interest in the produced natural gas.

The owner of the lease and such participants in his venture have legal title to all products resulting from the mining and manufacturing activities on the land. No lease provision enables or entitles the lessor to acquire any ownership or possessory interest in the natural gas produced or any part of it, except for a single exception for domestic use in the farmhouse on the premises. If lessor desires to use gas produced by the lessee for agricultural purposes on the land, he must, like everybody else, separately negotiate for its purchase, if he can. The lessee is free to dispose of its natural gas in any manner it desires. It can use it for its own purposes, either as fuel or as raw material for other products; it can sell it; or it can do both. Its payment obligation to the lessor consists of the transmittal of monthly rental amounts as set forth in the lease.

The landowner-lessor has absolutely nothing to do with the sale of such gas. He is not a party, signatory or non-signatory, to any of the arrangements involving the leasehold estate, including the sale or disposition of natural gas. He is not a party to any of the myriad of leasehold activities and in conducting all of these activities, including the sale of the gas, no one acts as his agent or is authorized so to act on his behalf. He has no role to play and no one plays a role for him. His only relevant activity is in signing the lease. His only status is as an owner of land burdened by the lease.

tendered by lessee into the registry of the trial court and paid pursuant to summary judgment in April of 1965. The court below also held that petitioner was required to pay additional rent for certain months under the provisions of the remaining leases, the "market value" leases. In addition, the court below held that petitioner was required to pay interest on the unpaid rentals under both types of leases. The judgment below results in the recovery of additional rentals by those respondents with "market value" leases of a total of approximately $700.00 for the entire five-year period, which is an average rental increase of less than one dollar per acre, per year,[3] in no recovery of additional rentals by those respondents with "proceeds"

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3. As stated above, additional monthly rental amounts were allowed only as to leases containing "market value" clauses. The leases in the Lightcap, Cutter and Stewart cases and two of the leases in the Flower case were held to be "proceeds" leases, with no additional monthly rental allowed.

In contrast to the impression that may have been created in petitioner's Petition, these additional royalties resulting from the "market value" lease provisions are the equivalent of from one-half cent to one cent per Mcf of the volume produced under the leases during the disputed months involved. This is less than one percent of the average annual regulated retail prices of natural gas for the years in question. See *Historical Statistics of the Natural Gas Industry*, American Gas Association, Department of Statistics, page 132, Table 76 (1977). These leases provide for payment of only 1/8, or less, of the wellhead value of monthly production. Respondents' counsel feel that petitioner did not intend to mislead this Court in setting forth in the last column on page 9 of its Petition "excess" figures ranging from 4 cents to 8.01 cents per Mcf. In any event, the actual impact of the judgment below on petitioner, on a per Mcf basis, because of the fraction in the leases, is less than 1/8 of such figures set forth by petitioner on its chart.

Out of the approximately 280 cases affected by the judgment below (see Petitioner's Appendix, page 78A), only about 90 of them involve such "market value" leases. The total dollar effect corresponding to the $700.00 amount involved in these particular cases, by reason of production over the entire approximately five years under all such "market value" leases, is estimated by counsel to be not in excess of $75,000.00.

leases,[4] and recovery of interest by all respondents under both types of leases of a total of approximately $2,500.00.[5]

All the members of the court below agreed that the fact the petitioner is regulated by the Federal Power Commission does not preclude enforcement of respondents' contractual common law recovery under any of the leases.[6] The court below was guided by federal court holdings involving exactly the same parties who are now before the Court. Totally consistent with the results of the prior litigation, the court below held that:

> "The Federal Power Commission has no jurisdiction over a royalty owner or over a dispute between a royalty owner and his producer as to the amount of royalties payable under a gas lease.
>
> "The obligation of a lessee to pay royalties to its lessor under a gas lease is a question of state law, to be determined under the terms of the lease.
>
> "The existence of federal regulation fixing the maximum rate a gas producer may receive from its purchaser is no obstacle to the fixing of a higher rate as the 'market value' of the gas it sells for the purpose of computing royalties.
>
> "Where a lease calls for royalties based on the 'market value' of the gas sold, in the absence of proof of a contrary intent that value is the price which would be paid by a willing buyer to a willing seller in a free market. (Opinion of the Supreme Court of the State of Kansas, Syl. Nos. 1-4, pp. 1-2) (Appendix A, pp. A1-A2)."

4. The highest total royalty compensation already paid and to be paid, under the judgment below is the equivalent of less than one cent to about two cents per Mcf of gas produced, with identical payments for some months under both "market value" and "proceeds" leases (1/8 of first two columns, Petition, page 10), amounting to an estimated total average rental of from $2.50 to $7.00 per acre per year over the entire five-year period.

5. Respondents' counsel estimate that the total prejudgment interest due, complained of by petitioner by reason of its federal impact, in all of such 280 cases affected by the judgment below (see Petitioner's Appendix, page 78A), may be as much as $150,000.00.

6. The individual members of the Court merely disagreed, wholly as a matter of state law respecting interpretation of contracts, about the proper construction of the phrases "proceeds" and "market value" found in the royalty clauses of the individual leases.

As the court below knew, these very parties had already been before this Court in *Mobil Oil Corp.* v. *Matzen*, in Case No. 71-1169 and related cases on the same claims now asserted by petitioner, which claims were disposed of adversely to the petitioner in those proceedings.[7] The present Petition, as the following discussion reveals, represents a bold attempt to relitigate claims previously adjudicated to finality.

After these state court suits had been pending about three years in the District Court of Stevens County, Kansas, during which time petitioner vigorously relied upon common law defenses,[8] petitioner seized upon the idea that (1) since the monthly rental is related to the monthly volume produced and (2) since it is mathematically possible to divide the monthly rental by the monthly volume produced to arrive at a per Mcf payment by petitioner, the

7. *Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972), *denying cert. to Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971).

8. These defenses principally centered around the contention that "market value" royalty payment required under the bargained terms of some of respondents' leases was the legal common law equivalent of petitioner's receipts under its cost-determined service rates fixed by the Federal Power Commission.

landowners were themselves sellers of natural gas and were natural gas companies subject to regulation under the Natural Gas Act. In addition, petitioner divined that because its costs of service happen to be stated on a per Mcf basis in its regulated gas service rate schedules, the rentals due the landowners when so regulated as such "companies" were governed by petitioners per Mcf cost of service. (Of course, such mathematical diversions can be fashioned with any of petitioner's costs, later referred to herein.)

To test this novel assertion of Federal Power Commission jurisdiction, petitioner filed a complaint against respondents before the Federal Power Commission, alleging that the Commission had jurisdiction over respondents' claims for additional royalty and that by asserting their common law contract claims, the respondents were violating the Natural Gas Act and the rules and regulations of the Federal Power Commission thereunder. Petitioner attached representative copies of respondents' state court pleadings and prayed that the respondents be enjoined from seeking additional royalties.[9]

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9. "Complaint of Mobil Oil Corporation," filed by petitioner October 14, 1966 in *Mobil Oil Corporation* v. *Carl F. Matzen, . . . Harry Lightcap, et al.*, FPC Docket No. RI67-114. (Record, pages 42, 54-62).

The present petitioner and respondents (or the persons for whom they have been substituted as parties herein upon the death of the original parties) now before this Court were the adversary parties in Federal Power Commission proceedings, appeal proceeding therefrom taken by respondents in the Tenth Circuit in *Matzen* v. *FPC*, No. 514-69, transferred to the District of Columbia Circuit (No. 24051) and in the appeal proceedings in that circuit taken by petitioner (No. 23463), all resulting in the decision in *Matzen* v. *FPC*, and related cases, 463 F.2d 256 (D.C. Cir. 1971) and in resulting certiorari proceedings before this Court, with certiorari denied. See *Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976, *reh. denied*, 409 U.S. 902 (1972). This identity of parties is evident from an examination of the list of respondents

(Footnote continued on following page)

In asserting this federal claim, squarely grounded on federal preemption under the Natural Gas Act, petitioner joined hands with other producers similarly situated in consolidated proceedings before the Federal Power Commission, urging the same grounds against their lessors as the producers did in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966) and *Weymouth* v. *Colorado Interstate Gas Co.*, 367 F.2d 84 (5th Cir. 1966). The Federal Power Commission stated that the purpose of the proceedings was to resolve whether it had jurisdiction over a landowner's royalty interest in natural gas leaseholds and, if answered in the affirmative, how such jurisdiction should be implemented. In addition, the Commission authorized evidence relating to the general industry practices with respect to gas leases and the "possible economic and legal consequences" of such royalty payments.[10] Forty-two consumer and industry groups participated in the consolidated proceedings before the Federal Power Commission.[11]

Footnote Continued—

in Appendix A of petitioner's "Appendices to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia" in Case No. 71-1169 before this Court. The present respondents, or the persons from whom they have been substituted as parties: Harry Lightcap, Box 1125, Hugoton, Kansas; William I. Cutter, 507 S. Van Buren Street, Hugoton, Kansas; Richard M. Stewart, 3228 Travis, Amarillo, Texas; Fern Ellen Maupin, Lazy Brook Farm, Holland, Ohio; W. Harold Parker, Route 4, Guymon, Oklahoma, and Fannie M. Flower, Hugoton, Kansas, are listed on pages 2, 3, 6, 7 and 8 in such Appendix as respondents and are the very respondents now again before this Court.

10. Record, page 103.

11. Those participating included William Harvey Denman, J. M. Huber Corporation; Mobil Oil Corporation; Continental Oil Company; Carl F. Matzen, et al.; Elmer Hennigh, et al.; Leland C. Waechter, et al.; Old Ocean Royalty Owners Association; Ashland Oil & Refining Company; Land and Royalty Owners of Louisiana; Terry Thompson, Jr., et al.; Tenneco Oil Company;

(Footnote continued on following page)

In the Federal Power Commission proceedings, specific evidence was introduced into the record relating to the economic impact on consumers and legal consequences of respondents' and other royalty owners' claims, including testimony on behalf of petitioner.[12] Based on the record and such evidence of specific economic and legal consequences of respondents' state court claims, a divided Federal Power Commission entered an order against respondents.[13]

Being aggrieved by the Federal Power Commission decision, these respondents, along with other state court plaintiffs embroiled in the Federal Power Commission proceedings, petitioned for review in the United States Court of Appeals for the Tenth Circuit.[14] Respondents' petition for judicial review was transferred to the District

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Footnote Continued—

State of Texas; Independent Petroleum Association of America; Cities Service Oil Company; Columbian Fuel Corporation; Kansas Corporation Commission; Phillips Petroleum Company; California Company, a Division of Chevron Oil Company; Pan American Petroleum Corporation; Marathon Oil Company; Atlantic Richfield Company; Humble Oil & Refining Company; Colorado Interstate Gas Company; Panhandle Eastern Pipe Line Company; Sinclair Oil & Gas Company; the State of California; Public Utilities Commission of the State of California; Northern Natural Gas Company; Texaco, Inc.; Public Service Electric and Gas Company; Cities Service Gas Company; Amerada Petroleum Corporation; Philadelphia Gas Works Division of the United Gas Improvement Company; Consolidated Edison Company of New York, Inc.; Orange and Rockland Utilities, Inc.; Long Island Lighting Company; Texas Independent Producers & Royalty Owners Association; Staff of the Federal Power Commission; Western Natural Gas Company; Shell Oil Company. (Record, pages 97-99, 102, 116-119).

12. See Joint Appendix in Cases No. 23463, et al. in the Court of Appeals for the District of Columbia Circuit, at pages 22, 23, 143-149, 150-154, 180-181, including Exhibit 113, "Mobil Oil Corporation, Illustrative Computation of Revenue Reduction With Royalty Settlement Based on Assumed Market Values."

13. Record, pages 116-143.

14. *Carl F. Matzen, et al.* v. *Federal Power Commission*, Case No. 517-69.

of Columbia Circuit, and petitioner here, with other producers, intervened in respondents' review proceedings.[15] Petitioner likewise filed judicial review proceedings in which respondents intervened.[16] These two actions for judicial review were consolidated for hearing with other similar judicial review proceedings filed by others, and resulted in a unanimous opinion by the court of appeals in *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), which reversed the Federal Power Commission.

Five Petitions for Writ of Certiorari, including one by the petitioner and one by the Federal Power Commission, were filed in this Court to review such judgment.[17] Certiorari was denied.[18] Petitioner's and other producers' Petitions for Rehearing were likewise denied.[19] All respondents in this present action were likewise respondents in such previous certiorari proceedings in this Court.[20]

It is thus apparent that there is an identity of opposing parties now before the Court and throughout such prior litigation from respondents' original petitions in the Kansas state court, beginning with petitioner's complaint proceedings before the Federal Power Commission, through review proceedings in the court of appeals, and finally

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15. See *Carl F. Matzen, et al.* v. *FPC*, *sub nom.*, *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256, 256-257 (D.C. Cir. 1971).

16. See *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256, 256-257 (D.C. Cir. 1971).

17. *Mobil Oil Corp.* v. *Carl F. Matzen, et al.*, No. 71-1169; *Cities Service Oil Co.* v. *Carl F. Matzen, et al.*, No. 71-1188; *Amoco Production Co.* v. *Waechter*, No. 71-1179; *Shell Oil Co.* v. *Carl F. Matzen, et al.*, No. 71-1191; and *FPC* v. *Mobil Oil Corp.*, No. 71-1326.

18. 406 U.S. 976 (1972).

19. 409 U.S. 902-903 (1972).

20. See Footnotes 1 and 9, *supra*.

through certiorari proceedings in this Court. In those proceedings, the same issues of federal law were fully litigated and decided adversely to the petitioner.

Petitioner was afforded a second opportunity to litigate the same federal questions when it sued respondents in *Mobil Oil Corp.* v. *Miller*,[21] in which petitioner sought from the United States District Court for Kansas a permanent injunction against respondents[22] enjoining them from proceeding with their state court actions. The present allegations now asserted by petitioner in its Petition are almost in haec verba the identical allegations contained in its complaint in the United States District Court.[23]

In its briefs before the federal district court, petitioner relied upon Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a), arguing that whether or not respondents are natural gas companies "as defined in the Act, their conduct in seeking increased royalty payments would fall

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21. Case No. W-3843 filed May 17, 1967 in United States District Court for the District of Kansas, in which these respondents were included personally as defendants. See Record, pages 42, 43-53. In that case, petitioner stated that the court's jurisdiction was derived from the Natural Gas Act (28 U.S.C. 15-717s and 717w) which confers upon the Court exclusive jurisdiction to enjoin any violation or threatened violation of the Natural Gas Act or the rules, regulations or orders of the FPC thereunder and relied on *Rayne Field, United Gas Improvements Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965), as it does here, and claimed that respondents' violation was an attempt to collect royalties on bases in excess of FPC effective rates. (Letter by counsel for Mobil to Judge Theis dated March 18, 1968.)

22. In Mobil's "Complaint and Application for Permanent Injunction," it described with particularity the defendants it was suing by reference to "Exhibit A" to "Exhibit 1" attached to its Complaint. (Record, page 43). Exhibit 1, so referred to, is Mobil's Complaint against Carl F. Matzen, et al., filed before the FPC instituting the proceedings above described, and Exhibit A to such Complaint contains the names and addresses of the respondents here and of the original state court plaintiffs to whose interests they have succeeded as parties to these cases. See Footnote 9, *supra*.

23. Record, pages 44-52.

within the Act because they were attempting to enforce 'any contract affecting' jurisdictional sales and that if a lease contract adversely affects the consumers, it is subject to FPC regulation."[24]

Other producer claimants in their petitions for injunctions brought against other state court landowner plaintiffs in similar cases which were consolidated for hearing with the injunction action brought by petitioner against respondents,[25] claimed that state court plaintiffs were violating the Natural Gas Act because they were making claims that concerned "*matters relating* to the transportation of natural gas and to the sale thereof in interstate and foreign commerce" within the meaning of Sections 1(a) and 1(b) of the Natural Gas Act, 15 U.S.C. §§ 717(a) and (b).[26] The federal district court entered its order for a preliminary injunction against respondents in the consolidated cases,[27] restraining them from proceeding in their state court cases until further order of the district court. All of the federal claims were decided on December 4, 1972, against petitioner on final judgment in that case.[28] The petitioner failed to appeal such final judgment. The litigated provisions of the Natural Gas Act in that case are the very ones that petitioner is now relying upon in support of its supremacy and commerce clause arguments in its present Petition.

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24. Page 2 of Mobil's "Response to Defendants' Supplemental Answering Brief in Opposition to Temporary Injunction on Rehearing," served June 26, 1967. See also pages 4-5 of "Memorandum Brief" of Mobil filed June 9, 1967.

25. Pan American Petroleum Corporation, now Amoco Production Company (No. W-3842) and Atlantic Richfield Company, formerly Sinclair Oil Company (No. W-3890). (Record, pages 90, 144).

26. Memorandum Brief of Pan American Petroleum Corporation filed June 9, 1967 in Case No. W-3842, page 5.

27. Record, pages 90-96.

28. Record, pages 144-145.

ARGUMENT

I

There Is No Important Question of Federal Law

Petitioner, in its Petition, has not fully disclosed the procedural history of this litigation for the obvious reason that it recognizes that no substantial federal question remains for adjudication by this Court. Respondents have attempted to correct the deficiencies of petitioner's Statement of the Case by tracing this procedural history. As respondent's Statement of the Case reveals, petitioner was afforded two opportunities to litigate the federal claims now raised by it in its Petition and, in fact, did raise those questions in those prior proceedings. In one case, the judgment against respondent resolving the issues became final on June 7, 1972, by reason of this Court's denial of petitioner's Petition for Certiorari. In the other case, finality resulted from the failure of petitioner to appeal from the district court judgment dated December 4, 1972.

Thus, the Petition represents a thinly disguised attempt to relitigate the same federal claims twice in controversy and litigated to final judgment between the same parties. This extended litigation, vexatiously pursued by petitioner, presents a classic circumstance for application of the doctrine of judicial repose. The Court should summarily deny this Petition since, as between these parties, all constitutional and statutory questions have been fully adjudicated over almost a generation of litigation. But, even if petitioner could somehow persuade the Court to ignore this fundamental doctrine of judicial repose, no significant constitutional or statutory question of law remains, as the following discussion demonstrates.

The monthly rental amounts, denominated "royalty," paid by petitioner to respondents by reason of the exercise of the privilege of mining and producing natural gas on respondents' property, as well as interest on amounts no longer disputed, are not different than any other expenses incurred by petitioner. Petitioner must also pay countless other creditors, who are likewise not subject to Federal Power Commission jurisdiction, for all goods and services for which it contracts. Numerous substantial items of expense are obviously incurred by petitioner and other natural gas companies. Among other items, these companies buy pipe, purchase leases, pay bonuses, hire well servicing units, hire drilling equipment, pay for pipeline rights-of-way, and even pay for the services of troubleshooters such as Red Adair, to extinguish fires at the wellhead. Each of these items of expense which, in the aggregate are many times greater than the amount of such rental payments, if later translated into recoverable costs, to the extent allowed in computing petitioner's rates, could raise the per Mcf price paid by the ultimate consumer for gas service. Each of such expense items is, if later found to have been reasonably incurred, included as a part of the cost of service reflected in rates.

The petitioner now attempts to single out one such category of debt, incurred for months beginning in 1958 (nineteen years ago). It argues that, because this indebtedness might somehow be translated by the Federal Power Commission in some future rate proceedings—first with petitioner, then with the pipeline company, and finally with the distributing company—as an allowable cost to be borne by future consumers, rather than by shareholders, the court below is forbidden to enforce the lease contract since such enforcement would frustrate the purpose of the Natural Gas Act and, therefore, would somehow violate the com-

merce clause and the supremacy clause. If this argument prevails, then the state courts could not enforce any contracts in which the party required to pay is a natural gas company. The seller of pipe, the employees of the petitioner, the lessor of drilling equipment, and even Red Adair, could not seek enforcement of their bargained-for contractual rights in state court.

Petitioner has not cited any authority for the proposition that a party not subject to the jurisdiction of the Federal Power Commission can be denied enforcement of his common law contractual right to payment because such enforcement could conceivably, by later Federal Power Commission actions, increase the price for gas service paid by the ultimate consumer. The reason for petitioner's failure to support its novel argument is obvious. We do not believe petitioner can find any case in which any court has ever held, for example, that an employee of a natural gas company cannot enforce his or her employment contract because such enforcement could ultimately be reflected in rates paid by the ultimate consumer. The attenuated constitutional argument now asserted by petitioner is without any basis and is created out of whole cloth. The commerce clause and the supremacy clause were never intended to prevent the enforcement of common law contracts to which a natural gas company was a party, and Congress, in enacting the Natural Gas Act, never intended to change that circumstance. Legitimate costs, such as those paid to respondent landowners in the form of rentals for use of their real estate, to the extent, if any, reflected in ultimate service rates, do not place a burden on interstate commerce. Such costs are the lifeblood which makes commerce possible, which commerce the Federal Power Commission must promote and protect from exploitation by natural gas companies.

Petitioner, lacking statutory or judicial authority for its assertions, falls back to arguments regarding what it calls "public policy," dons sheep's clothing, and waves the banner of consumer protection. But, as this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685 (1954) stated the Natural Gas Act was designed "to protect consumers against exploitation *at the hands of natural gas companies.*" (Emphasis added). Congress attempted to stop such exploitation by a "handful of holding companies" who created "specific evils" by authorizing the Federal Power Commission to establish "just and reasonable" rates charged by them. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). Petitioner has been held to be included in that handful. Its "public policy" argument boils down to an unsupportable claim that such handful also includes hundreds of thousands of farmers and landowners throughout the country.

The petitioner fails to explain that the Federal Power Commission, through regulation of petitioner's service rates, fully protects the consumer from the exploitation contemplated by Congress. It also fails to explain that only the courts can protect the landowners from exploitation by petitioner.

If petitioner's cost of service increases by virtue of the operation of the lease agreement, the petitioner may seek individualized relief for an increase in allowable service rates to protect itself from loss of reasonable profits. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 328 (1974). The Commission may, nevertheless, protect the consumer by declining to grant such individualized relief in appropriate circumstances.

Through regulation of the reasonableness of producer's rates in the light of *all* of its *costs, revenues, investments*

and *a reasonable* return, the Commission can and does protect the consumers of natural gas. In *Pennzoil Producing Co.* v. *FPC*, 553 F.2d 485, 488 (5th Cir. 1977), a recent case in which the court of appeals held that the Commission had the authority to allow increased royalties to be reflected in the producer's interstate rates, the court stated:

> "This is not to say that every additional cost must be passed through to the customer to protect a producer's level of profits. The Commission has authority to consider the reasonableness of any costs incurred. *Mobil Oil Corp.* v. *FPC*, [463 F.2d 256 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 976, *reh. denied*, 409 U.S. 902-903 (1972)], *supra* at 263. Determination of the reasonableness of a cost necessarily requires consideration of market price. In all probability, the reasonableness of a great many costs of gas production must be determined by the prevailing market price in an uncontrolled market. The Commission has failed to suggest why royalty costs in an uncontrolled market are any different from any other cost."

II

The Decision Below Is Clearly Correct and Consistent With the Decisions of This Court

The Kansas Supreme Court held that federal regulation establishing maximum producer per Mcf service rates for its interstate gas delivery service presents no impediment to the computation of royalties on the basis of a higher per Mcf "market value" of the gas itself under the few pertinent lease agreements. Since the time of the denial of certiorari to petitioner in *Mobil Oil Corp.* v. *Matzen*, and related cases involving respondents, 406 U.S. 976, *reh. denied*, 409 U.S. 902-903 (1972), this Court has recognized that the Federal Power Commission does not have jurisdiction to establish the royalties contractually due lessors. In *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974), this Court responded to Mobil's subsequent complaint that the Federal Power Commission failed to provide automatic adjustments in area rates to compensate for anticipated higher royalty costs which could conceivably result from the holding in *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (1971), involving these respondents, decided three years earlier. This Court summarized the earlier cases involving these respondents and the petitioner as reversing "a Commission holding that subject royalties to FPC administrative ceilings." This Court then reiterated the court of appeals' finding that "'[i]f, as subsequent events develop, the producers are put in a bind by their royalty obligations, they may certainly petition the FPC for individualized relief.'" 417 U.S. at 328. The Court there was discussing Mobil's argument concerning the very lease rentals now again before this Court. This Court was there affirming the opinion in *Placid Oil Co.* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), which unequivocally stated:

> "[T]he royalty obligations of the producers . . . would be an *Erie* determination of the contract stating the royalty percentage based upon the applicable principles of state law—totally beyond the control of the federal regulatory agency charged with the responsibility of regulating natural gas rates." 483 F.2d 880, 911.

Selecting excerpts from prior opinions of this Court, which state that the Natural Gas Act was aimed at consumer protection from petitioner and other natural gas

companies, the petitioner asserts that any costs incurred by it which could conceivably increase the price of gas necessarily place a burden on interstate commerce and therefore come under the purview of the Federal Power Commission. This contention fails to consider that the Federal Power Commission lacks jurisdiction over landowners and royalty payments due them.[29]

> "*Three* things and *three only* Congress drew within its regulatory power, delegated by the [Natural Gas] Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation for resale." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U.S. 507, 516 (1947) (Emphasis added).

The petitioner does not attempt to explain how or why the Court should circumvent the express statutory limitations of the Natural Gas Act. The broad assertions based on petitioner's version of public policy, which form the basis of the petitioner's entire argument, are without supporting congressional intent. Respondents believe

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29. This Petition for a Writ of Certiorari represents a thinly disguised attempt to relitigate the court of appeals' holding in *Mobil Oil Corp.* v. *FPC,* 463 F.2d 256 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 976, *reh. denied,* 409 U.S. 902-903 (1972). Although the petitioner apparently accepts this decision as a valid and binding adjudication, it now asserts that notwithstanding the fact that the lessor is not a natural gas company under Section (4) of the Natural Gas Act, the commerce clause and supremacy clauses preclude the lessor from recovering royalty payments computed on an Mcf basis in excess of the Mcf basis used in establishing petitioner's service rates. The result of petitioner's argument would deny respondents their constitutional right of substantive and procedural due process and result in the taking of interests in land without just compensation, protected by the Fifth Amendment.

that, as Judge Levanthal, speaking for the District of Columbia Circuit, stated in petitioner's and respondents' case, *Mobil, supra,* "we do not say [such an interpretation stretching the Act] will be possible." 463 F.2d 256, 263.

If Congress intended that all costs incidental to the exploration for and production of gas sold in interstate commerce should be controlled by the Federal Power Commission, it would have so provided in the Natural Gas Act. But, of course, Congress did not so provide. The provisions of the Natural Gas Act delineate the limits of the Commission's power. Until and unless Congress constitutionally delegates authority to the Federal Power Commission over landowner-lessors and the amounts due them under the leases, it does not have that authority. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U.S. 507 (1947). Neither the Natural Gas Act, the commerce clause, the supremacy clause, nor any decision of any court gives the Commission such power.

CONCLUSION

The extensive federal litigation preceding the decision of the court below has conclusively decided all federal questions the petitioner now addresses to the Court. Guided by the decisions of the federal courts, the court below unanimously found no federal constitutional or statutory provision that presents a theoretical obstacle against respondents' recovery of their common law claims. It is respectfully submitted that these vexatious and extended proceedings should be put to rest after almost a

generation of litigation by denial of the Petition for a Writ of Certiorari.

Respectfully submitted,

DALE M. STUCKY
GERRIT H. WORMHOUDT
P. O. Box 997, 125 N. Market
Wichita, Kansas 67201
Attorneys for Respondents

Of Counsel:

FLEESON, GOOING, COULSON & KITCH
P. O. Box 997, 125 N. Market
Wichita, Kansas 67201

KRAMER, NORDLING, NORDLING & FAY
P. O. Box 250
Hugoton, Kansas 67951